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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 732.

CATHERINE JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING

Petitioner, Catherine Johnson, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of the order of this Court, entered in this case on March 23, 1970, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The reasons for this Petition for Rehearing, hereinafter stated, are confined to substantial and controlling intervening circumstances and grounds not previously presented.

QUESTIONS PRESENTED.

Whether Rule 16 of the Federal Rules of Criminal Procedure requires a United States District Court upon timely pretrial motion by a defendant charged with perjury to grant her attorney access to the grand jury testimony of the persons whose grand jury testimony brought about the indictment, without the showing of a particularized need heretofore required under Rule 6(e).

RULES INVOLVED.

Rules 6(e) and 16(b) of the Federal Rules of Criminal Procedure provide, in relevant part, as follows:

6(e): *Secrecy of Proceedings and Disclosure*:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. * * *

16(b): *Other Books, Papers, Documents, Tangible Objects or Places*:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable.

STATEMENT OF THE CASE.

The statement here will be confined to facts essential to the question raised in this Petition for Rehearing.

On January 24, 1966, Petitioner was subpoenaed before a grand jury and interrogated with respect to her affidavit filed in the case of *United States v. James R. Hoffa*, in which affidavit Petitioner claimed that she had engaged in acts of sexual intercourse with certain members of the sequestered Hoffa jury during the Hoffa trial.

After she claimed her Fifth Amendment right to decline to testify, she was granted immunity and ordered to testify by Chief Judge Taylor (R. 124-125). Petitioner then testified to sexual relations with members of the Hoffa jury (Jurors Link, Curbow and Bonner). She was later charged in a one count indictment that such testimony was perjurious (18 U.S.C. 1621).

Counsel seasonably sought to procure her grand jury testimony, and the grand jury testimony of the jurors Petitioner had identified as those persons with whom she had had sexual intercourse. The motion was granted by the District Court as to Petitioner's grand jury testimony. But the Court denied Petitioner's motion to provide her with the grand jury testimony of jurors Bonner, Link and Curbow; although the indictment specifically stated that the perjury with which Petitioner was charged was that she had falsely testified before the grand jury that she had had sexual relations with Link and Curbow.

REASONS FOR GRANTING THIS PETITION FOR REHEARING.

The question raised by this Petition for Rehearing was not raised in the petition for certiorari, i.e. whether under Rule 16 the grand jury testimony of her accusers should have been made available to her counsel under Rule 16(b). The same issue was before this Court in *United States v. Gifford Hill American, Inc.*, No. 515 this term; certiorari there was granted, but the case later dismissed as moot when pleas of nolo contendere were accepted by the District Court post grant of certiorari. In *Gifford Hill* the Fifth Circuit found that Rule 16 dispenses with the requirement of particularized need (Pet. No. 515, App. A, p. 38) and that the Rule compels grant of a de-

fendant's motion for "(g)rand (j)ury transcripts are 'documents.' *Cf. Fryer v. United States*, 207 F.2d 134, 136-37 (D.C. Cir. 1953)." Pet. No. 515, App. pp. 41-42. In seeking certiorari there, the Solicitor General admitted that if the rule enunciated by the Fifth Circuit was correct, the particularized need test would "have no further application to discovery of grand jury transcripts" but that henceforth grand jury transcripts are to be made available under the less exacting standard of materiality under Rule 16(b). It is clear beyond question that the Link-Curbow testimony was material here. (See Pet. this case, No. 732, App. p. 32, Judge O'Sullivan dissenting. Petitioner's application for rehearing en banc was denied by an equally divided court four to four.)

In asking that the case be dismissed as moot the Solicitor General in *Gifford Hill* (No. 515, memorandum suggesting mootness p. 2), said, "* * * the questions presented here are likely to recur in future cases * * *." That fact is evident. At least one District Court and one Appellate Circuit now consider that Rule 16 requires the disclosure of "material" grand jury testimony to a timely moving defendant, without a showing of "particularized need." The question will recur until settled by this Court. The case at bar offers a peculiarly appropriate one to determine the issue.

CONCLUSION.

For all of the above reasons advanced, the Petition for Rehearing should be granted.

Respectfully submitted,

MOSES KRISLOV,
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Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

Pursuant to the requirements of Rule 58(2) of the Revised Rules of the United States Supreme Court, the undersigned, counsel for Petitioner, Catherine Johnson, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay and is restricted to those grounds specified in said rule.

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